

The Honorable Kymberly K. Evanson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TONNY STOREY, individually and on behalf of all others similarly situated,

Plaintiff,

V.

AMAZON.COM SERVICES, LLC,

Defendant.

No. 2:23-CV-01529-KKE

JOINT STATUS REPORT AND DISCOVERY PLAN

Pursuant to Federal Rule of Civil Procedure 26, Civil Local Rules 16(a) and 26(f), the and the Court’s order dated October 31, 2023 (Dkt. 14), Plaintiff Tonny Storey (“Plaintiff” or “Storey”) and Defendant Amazon.com Services, LLC (“Defendant” or “Amazon”) (collectively, “the Parties”), hereby submit this Joint Status Report following the Parties’ conference pursuant to Federal Rule of Civil Procedure 26(f).

1. NATURE AND COMPLEXITY OF CASE

Plaintiff's Statement: This is a putative nationwide class action brought under Washington contract, unjust enrichment, and consumer protection laws arising out of Amazon's alleged failure to provide refunds of extra shipping fees paid by customers for delivery within guaranteed time windows when the ordered goods were not delivered within those delivery windows. Amazon has moved for dismissal of Plaintiff's claims and summarizes

1 its arguments in support of dismissal in its statement below. Plaintiff disagrees with the factual
 2 and legal premises of Amazon's arguments but believes this joint status report is not the place
 3 to argue about the merits of the case. Plaintiff will fully respond to Amazon's arguments in his
 4 opposition to the pending motion to dismiss.

5 Although Plaintiff believes the case hinges on relatively straightforward questions of
 6 Washington common and consumer protection law, the legal and factual issues in dispute are
 7 of moderate complexity given the request for class certification and issues of discovery, data
 8 retrieval and analysis, and case management entailed by that request.

9
 10 **Defendant's Statement:** Plaintiff Tonny Storey alleges that in March 2023 he ordered
 11 a variety pack of herbal tea for \$19.99 and selected overnight delivery for a \$2.99 shipping
 12 charge. Complaint ¶ 4.7 (Dkt. 1.2). He does not allege the word "guaranteed" appeared at any
 13 point during his checkout process. *Id.* After selecting "overnight" shipping, he was given the
 14 option of stating a preference for one of two hours-based time windows on that date, either 4
 15 a.m. to 8 a.m., or 7 a.m. to 11 a.m. *Id.* Plaintiff admits he received his order overnight and on
 16 the date he selected. *Id.* ¶ 4.16. Because his order arrived a few hours after the delivery window
 17 Plaintiff selected, however, he alleges the delivery did not meet Amazon's "guarantee" to
 18 deliver his order on a specific date. This, according to the Complaint, should have entitled
 19 Plaintiff to automatically receive a \$2.99 refund under the relevant Help & Customer Service
 20 pages (the "Terms") regarding guaranteed delivery on Amazon.com. *Id.* ¶¶ 4.16-4.18, 4.20-
 21 4.21; *see also* Request for Judicial Notice, Exs. 1, 2, 3 (Dkt. 18). He does not allege to have
 22 sought a refund from Amazon prior to filing suit.

23 As described above, Plaintiff concedes the Terms govern his claim. Dkt. 1.2 ¶ 4.2-4.4;
 24 Dkt. 18, Exs. 1, 2, 3. But as his Complaint (and the Terms that are incorporated by reference,

1 and that may be judicially noticed, make clear): (1) for any order to qualify for “guaranteed
 2 delivery,” the order must state the word “guaranteed” as to the delivery date appearing on the
 3 final page before the customer places an order (*Id.*, Ex. 1); (2) the delivery “guarantee,” when
 4 it applies, only extends to *date*, and says nothing about delivery by a specific *time* on that date
 5 (*Id.*, Exs. 1, 2, 3); (3) if the “guarantee” is not met, the customer may then contact Customer
 6 Service to obtain a refund for any shipping charges paid to receive in on that date (*Id.*, Ex. 2).

8 Based on these allegations, Plaintiff asserts claims for breach of contract and violation
 9 of Washington’s Consumer Protection Statute (“CPA”). Dkt. 1.2 ¶¶ 6.1-6.8; 6.13-6.17. In the
 10 alternative to his breach of contract claim, he seeks restitution for unjust enrichment. *Id.* ¶¶
 11 6.9-6.12. Plaintiff seeks to represent a class of “[a]ll persons and entities who purchased a
 12 product from Amazon or a third party on the Amazon online retail platform who paid a fee for
 13 a Guaranteed Delivery by Amazon on a stated date and/or time, whose product was not
 14 delivered according to the terms of the Guaranteed Delivery, who were entitled to a refund of
 15 shipping fees under the Guaranteed Delivery Times and Conditions, and who were not
 16 provided a refund of shipping fees by Amazon for its failure to satisfy the Guaranteed
 17 Delivery.” *Id.* ¶ 5.1.

19 Amazon denies the allegations in the Complaint, denies that the Complaint states a
 20 claim against Amazon, denies that Plaintiff is entitled to any relief whatsoever, and denies that
 21 class certification is appropriate. Amazon has accordingly filed a Motion to Dismiss pursuant
 22 to Rule 12(b)(6) (Dkt. 17) (Dec. 5, 2023).
 23
 24
 25
 26

1 **2. DEADLINE FOR JOINING ADDITIONAL PARTIES**

2 **Plaintiff's Statement:**

3 Plaintiff believes that, aside from the deadline for class certification, a reasonable
4 deadline for joining additional parties without leave of court is February 16, 2024. Plaintiff
5 also believes that the deadline for motions relating to class certification should be set no earlier
6 than June 10, 2024 in light of Amazon's pending Motion to Dismiss, which is noted for hearing
7 on February 13, 2024, the need for discovery preparatory to the motion for class certification,
8 and the existing commitments of counsel for both Parties.

9
10 **Defendant's Statement:**

11 Amazon believes it is premature at this time to propose a trial schedule or deadlines for
12 joining additional parties, for the close of fact discovery, or for moving for class certification.
13 Instead, Amazon proposes that, after the Court has ruled on its pending Motion to Dismiss, the
14 Parties shall confer and propose a schedule for deadlines up to and including the filing deadline
15 and briefing schedule for Plaintiff's anticipated motion for class certification. Following the
16 Court's ruling on Plaintiff's anticipated motion for class certification, the Parties shall confer
17 and propose a schedule for the remaining pretrial deadlines, including deadlines related to
18 dispositive motions and trial readiness. In all events, if Amazon's Motion to Dismiss is denied,
19 Amazon believes an appropriate schedule would allow for 10-12 months of discovery
20 beginning from the time of the denial of the Motion until the deadline for Plaintiff's anticipated
21 motion for class certification.

22
23 **3. CONSENT TO MAGISTRATE JUDGE**

24
25 No.

26

1 **4. SCHEDULING OF CLASS CERTIFICATION**

2 **Plaintiff's Statement:**

3 If the Court does not stay discovery pending adjudication of Amazon's Motion to
4 Dismiss, Plaintiff proposes the following schedule for his motion for class certification:

5 Motion: June 10, 2024

6 Response: July 8, 2024

7 Reply: August 5, 2024

8 If the Court does stay discovery, then Plaintiff proposes that the deadline for his class
9 certification motion be set for 180 days after the Court's order on the Motion to Dismiss.

10 **Defendant's Statement:**

11 *See supra* Section 2.

12 **5. DISCOVERY PLAN**

13 **(A) Initial Disclosures**

14 The Parties served their initial disclosures on December 5, 2023.

15 **(B) Subjects, Timing, and Potential Phasing of Discovery**

16 **Plaintiff's Statement:**

17 Plaintiff does not believe discovery should be stayed pending determination on
18 Amazon's Motion to Dismiss because such a stay would unnecessarily delay litigation and the
19 ultimate resolution of the case to the detriment of Plaintiff and the proposed class.

20 Plaintiff further believes that no formal bifurcation or staging of discovery is necessary
21 or appropriate, but expects that the initial phase of discovery will generally focus on the named
22 Plaintiff's individual claim and on issues relevant to class certification, including such matters
23 as the number of putative class members, identification of the evidence necessary to establish

1 the elements of and defenses to the named Plaintiff's claim, existence, structure, and accessibility
2 of guaranteed delivery fee and delivery time data relevant to Plaintiff's claim, and evidence
3 relevant to demonstrating commonality, typicality, and predominance. This initial focus,
4 however, does not mean that initial discovery should not encompass class-wide information or
5 entail only sampling of class-wide information and data. For example, Plaintiff believes that
6 initial discovery should encompass class-wide data on guaranteed delivery fees, delivery times,
7 and refunds to the extent that is available in easily searchable and exportable electronic format.
8 Plaintiff believes that sampling of class-wide information would only be appropriate if full
9 production of class-wide data would cause undue or disproportionate burden to Amazon.
10

Finally, Plaintiff believes the Parties can and will cooperate to prioritize discovery to maximize efficiency and minimize undue burden and expense without the need for formal phasing of discovery, appointment of a discovery master, or other special interventions by the Court.

Defendant's Statement:

17 Amazon believes discovery should be stayed pending resolution of its pending Motion
18 to Dismiss because its Motion turns on threshold issues that should be resolved as quickly and
19 efficiently as possible, including (1) whether Plaintiff alleges his purchase “guaranteed” under
20 the terms of the relevant contract; (2) if so, whether the “guarantee” was breached under the
21 terms of the relevant contract where Plaintiff alleges he received his order on the date
22 promised; (3) if so, whether the “guarantee” was breached under the terms of the relevant
23 contract where Plaintiff does not allege to have contacted customer service for a refund; (4) if
24 so, whether Plaintiff failed to satisfy a condition precedent to his contract claim by failing to
25 contact customer service; (5) whether Plaintiff has sufficiently pled his CPA claim where it is
26

1 based on the same conduct as his insufficiently pled contract claim; and (6) whether Plaintiff
 2 can seek unjust enrichment where the Parties agree that a valid contract covers Plaintiff's
 3 claim. If the Court accepts Amazon's defenses, then that would resolve this case and obviate
 4 the need for costly and time-consuming. And even if the Court rejects Amazon's defenses, the
 5 Parties will have the benefit of the Court's interpretation of the relevant contract, which would
 6 help ensure that discovery is appropriately tailored. Amazon therefore reserves the right to seek
 7 relief from the Court, as may be necessary, to stay discovery during the pendency of a decision
 8 on its Motion to Dismiss.

10 Amazon agrees that if its pending Motion to Dismiss is denied, discovery should move
 11 forward. If discovery proceeds, Amazon anticipates taking written and oral fact discovery on
 12 at least the following topics: Plaintiff's alleged purchase of herbal tea from Amazon on March
 13 27, 2023, including any notices he received from Amazon about the purchase or delivery of
 14 such item; the reasons that Plaintiff did not refuse delivery of, or contact customer service
 15 about, the delivery of such item; and the damages, if any, that he alleges he suffered. Amazon
 16 reserves the right to propose phasing discovery, or any other phasing motions, if the case
 17 proceeds following the Court's ruling on its pending Motion to Dismiss.
 18

19 **(C) Electronically Stored Information**

20 The Parties do not currently anticipate any special issues relating to electronically
 21 stored information ("ESI"). The Parties have conferred with their respective counsel about
 22 the need to preserve evidence that may be relevant to the claims or defenses in this action,
 23 including the preservation of ESI.
 24

1 **Plaintiff's Statement:**

2 Plaintiff believes that discovery of ESI will focus on data relating to when (and how
3 much) customers paid for guaranteed delivery times, when deliveries were made outside the
4 guaranteed delivery time windows, and when refunds were provided. Initial ESI discovery will
5 include the how such information is stored and identification of custodians of such ESI.
6 Plaintiff believes that discovery of electronically stored information should be subject to the
7 Court's Model Protocol for Discovery of ESI.

9 **Defendant's Statement:**

10 If this case proceeds, the Amazon proposes that the Parties submit to the Court for its
11 review and approval a proposed ESI Protocol based on the Western District of Washington's
12 Model Agreement re: Discovery of ESI. Amazon proposes that the ESI Protocol be due within
13 14 days of the Court's ruling on Amazon's Motion to Dismiss.

15 (D) **Privilege Issues**

16 The Parties do not anticipate any special issues related to privilege but are prepared to
17 address privilege issues and attempt to resolve any issues that arise.

18 **Plaintiff's Statement:**

19 Plaintiff proposes that the Parties submit a proposed Protective Order to this Court
20 following submission of this Joint Status Report.

22 **Defendant's Statement:**

23 If this case proceeds, Amazon proposes that the Parties submit to the Court for its
24 review and approval a proposed Protective Order based on the Western District of
25 Washington's Model Stipulated Protective Order governing the production and handling of
26 privileged, confidential, proprietary, and otherwise sensitive discovery materials in this matter.

1 The proposed protective order will also provide a procedure, consistent with the Federal Rule
2 of Evidence 502(b), for clawing back inadvertently disclosed privileged documents. Amazon
3 proposes that the Protective Order be due within 14 days of the Court's ruling on Amazon's
4 Motion to Dismiss.

5 **(E) Proposed Limitations on Discovery**

6
7 The Parties do not anticipate proposing any modifications to the discovery rules at this
8 time. Should any Party seek to exceed any limitations set forth by the Federal Rules of Civil
9 Procedure or the Local Civil Rules, the Parties will meet and confer in attempts to reach
10 agreement.

11 **(F) Discovery-Related Orders**

12 The Parties disagree on whether discovery should be stayed pending determination of
13 Amazon's Motion to Dismiss and anticipate that this issue will be raised by motion to the Court
14 if necessary.

15 As described above, the Parties also disagree as to the timing of the Protective Order
16 and ESI Protocol.

17 Other than these two items, the Parties do not believe that any other discovery-related
18 orders are needed at this time but will confer and attempt to reach agreement if later
19 developments in the case indicate that any orders would be necessary or appropriate.

20 **6. ITEMS SET FORTH IN LOCAL RULE 26(f)(1)**

21 **(A) Prompt Case Resolution**

22 The Parties are aware of the benefits of early resolution, but do not anticipate they
23 will be able to resolve this matter promptly.

24 **(B) ADR**

The Parties agree that, if and when they mutually agree that participating in some form of alternative dispute resolution may be productive, they will likely do so through private mediation.

(C) Related Cases

The Parties are not aware of any related cases.

(D) Discovery Management

The Parties do not anticipate the need for any special discovery management beyond the items addressed above.

(E) Anticipated Discovery Sought

Plaintiff's Statement: Plaintiff anticipates seeking discovery of: data relating to guaranteed delivery fees, associated delivery times, and refunds for all putative class members; corporate policies and practices relating to guaranteed delivery times and refunds; the terms and conditions of Amazon's agreements with consumers; and data relating to any contractually-specified exceptions to the refund policy (e.g., acts of god, etc.); and damages.

Defendant's Statement:

See supra Section 5(B).

(F) Phasing Motions

The Parties agree that Amazon's Motion to Dismiss, which is noted for February 13, 2024, should be adjudicated before any class certification motion.

Plaintiffs' Statement: Plaintiff does not believe that any other phasing of motions is necessary at this time.

Defendant's Statement: Amazon reserves the right to propose phasing motions—including the potential of a motion for summary judgment as to the Plaintiff's claims prior to

1 class certification—if the case proceeds following the Court’s ruling on its pending Motion to
2 Dismiss, *see supra* Section 5(B).

3 **(G) Preservation of discoverable evidence**

4 *See supra* Section 5(C).

5 **(H) Privilege Issues**

6 *See supra* Section 5(D).

7 **(I) Model Protocol for Discovery of ESI**

8 *See supra* Section 5(C).

9 **(J) Alternatives to Model Protocol**

10 *See supra* Section 5(C).

11 **7. PATENT CASES.** N/A

12 **8. DISCOVERY COMPLETION DATE**

13 **Plaintiff's Statement:** Plaintiff believes that the Court’s decision on the motion for
14 class certification and on any dispositive motions filed by the parties would significantly
15 impact the amount and timing of discovery and therefore proposes that the Court hold a status
16 conference in October 2024 to set a discovery cutoff, trial date, and length of trial.

17 **Defendant's Statement:** *See supra* Section 5.

18 **9. BIFURCATION**

19 The Parties do not currently believe that bifurcation of issues at trial is necessary.

20 **Plaintiff's Statement:** Plaintiff reserves the right to seek bifurcation or other phasing
21 of discovery should later developments in the case indicate it is appropriate.

22 **Defendant's Statement:** Amazon reserves the right to seek bifurcation or other
23 phasing of discovery following the Court’s ruling on the Motion to Dismiss (Dkt. 17) as set

1 forth above in Section 5(B), and to seek bifurcation of issues at trial at an appropriate time
2 before trial.

3 **10. PRE-TRIAL STATEMENTS AND ORDERS**

4 At this time, the Parties agree that they will comply with, and not dispense with, pretrial
5 statements and the pretrial order.

6 **Plaintiff's Statement:** Plaintiff believes this can be further discussed at the requested
7 status conference in October 2024.

8 **Defendant's Statement:** Amazon reserves the right to dispense with such statements
9 at an appropriate time before trial.

10 **11. INDIVIDUALIZED TRIAL PROGRAM**

11 The Parties do not presently intend to utilize the Individualized Trial Program set
12 forth in Local Civil Rule 39.2 or any ADR options set forth in Local Civil Rule 39.1.

13 **12. SHORTENING OR SIMPLIFYING THE CASE**

14 The Parties are not presently aware of any other matters that may facilitate the just,
15 speedy, and inexpensive disposition of this matter.

16 **13. Date Ready for Trial**

17 **Plaintiff's Statement:** Plaintiff believes that the Court's decision on class certification
18 will significantly impact the length and timing of trial, and that due to the need to conduct
19 discovery and motions practice relating to class certification, the case will not be ready for trial
20 until at least 18 months after the filing of this Joint Status Report. Plaintiff requests that the
21 Court hold a status conference in October 2024 to set a discovery cutoff, trial date, and length
22 of trial, and anticipate that by that date they will have a much improved sense of discovery
23 remaining to be completed and the scope of a potential class trial.

1 Defendant's Statement: *See supra* Section 2.

2 **14. JURY/BENCH TRIAL**

3 Plaintiff's Statement: Jury.

4 Defendant's Statement: Plaintiff has requested a trial by jury of all matters that can
5 be so tried. If this case proceeds, Amazon reserves its rights to challenge Plaintiff's entitlement
6 to a jury trial for certain of his claims and remedies.
7

8 **15. NUMBER OF TRIAL DAYS**

9 Plaintiff's Statement: Plaintiff believes the Court's decision on class certification will
10 significantly impact the length and timing of trial and request that the Court hold a status
11 conference in October 2024 to set a discovery cutoff, trial date, and length of trial.
12

13 Defendant's Statement: The expected length of trial will depend on the resolution of
14 any motion for class certification and/or dispositive motions, and is therefore unknown at this
15 time.
16

17 **16. NAMES, ADDRESSES AND TELEPHONE NUMBERS FOR ALL
TRIAL COUNSEL**

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1 **17. TRIAL SCHEDULING CONFLICTS**

2 **Plaintiff's Statement:** None known at the present time.

3 **Defendant's Statement:** Amazon proposes that the Parties provide the dates on which
4 trial counsel may have conflicts or other complications to be considered in setting a trial date
5 at an appropriate time following the Court's rulings on Amazon's pending Motion to Dismiss
6 (Dkt. 17) and Plaintiff's anticipated motion for class certification.
7

8 **18. SERVICE**

9 Amazon has been served.

10 **19. SCHEDULING CONFERENCE**

11 **Plaintiff's Statement:** As noted above, Plaintiff requests that the Court hold a status
12 conference in October 2024 to set a discovery cutoff and trial date and before entering a Rule
13 16 order.
14

15 **Defendant's Statement:** Amazon does not currently anticipate a need for a scheduling
16 conference. Amazon proposes that, if either Party anticipates the need for a scheduling
17 conference following resolution of the motion to dismiss, the Parties can so note that in the
18 proposed schedule to be submitted following the Court's ruling on the pending Motion to
19 Dismiss, as described above.
20

21 **20. CORPORATE DISCLOSURE STATEMENTS**

22 Amazon filed its disclosure statement pursuant to Federal Rule of Civil Procedure 7.1
23 and Local Rule 7.1 on October 4, 2023. Dkt. 5.
24

25 **21. CERTIFICATION REGARDING RULES AND FILING PROCEDURES**

26 All counsel certify that they have reviewed the Civil Rules, the Local Rules, and the
applicable Electronic Filing Procedures.

1 **22. CERTIFICATION REGARDING STANDING ORDER**

2 All counsel certify that they have reviewed and complied with Judge Evanson's
3 Standing Order Regarding 28 U.S.C. § 455(b)(2) and Canon 3(C)(1)(b) of the Code of Conduct
4 for United States Judges.

5

6

7 DATED this 12th day of December, 2023.

8 SCHROETER GOLDMARK & BENDER

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9 *s/ Adam J. Berger*

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